

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

STATE OF OREGON,)
)
Plaintiff,) Washington County
) Circuit Court
v.) No. 16CR46339
)
BENJAMIN JAY BARBER,) CA A163786
)
Defendant.) **Volume 5 of 5**

TRANSCRIPT OF PROCEEDINGS ON APPEAL

BE IT REMEMBERED that the above-entitled
Court and cause came on regularly for hearing before
the Honorable Beth L. Roberts, on Thursday, the 1st
day of December, 2016, at the Washington County
Courthouse, Courtroom No. 304C, Hillsboro, Oregon.

APPEARANCES

Marie Atwood, Deputy District Attorney,
Appearing on behalf of the State;

Cameron Taylor, Attorney at Law,
Appearing on behalf of Defendant Barber.

ALSO PRESENT

Melanie Kebler, Attorney at Law.

KATIE BRADFORD, CSR 90-0148

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Proceedings recorded by digital audio recording;
transcript provided by Certified Shorthand Reporter.

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1 (Volume 5, Thursday, December 1, 2016, 8:28 a.m.)

2 P R O C E E D I N G S

3 (Whereupon, the following proceedings
4 were held in open court:)

5 THE COURT: Thank you. Please be
6 seated.

7 All right. We're here this morning on
8 the State of Oregon versus Benjamin Barber,
9 16CR46339. Mr. Barber is present with his attorney,
10 Mr. Taylor. And Ms. Atwood is here on behalf of the
11 State.

12 And this is the time for sentencing on a
13 guilty verdict on five counts of Unlawful
14 Dissemination of an Intimate Image.

15 And, Mr. Taylor.

16 MR. TAYLOR: Judge, good morning.
17 Before we begin, I just wanted to let the Court know
18 about one issue. My client has prepared a motion in
19 arrest of judgment. I do not intend to argue this
20 matter. However, I talked to folks about how to
21 handle this situation.

22 And the advice that I was given was to
23 inform the Court of this, ask if the Court would be
24 willing to hear Mr. Barber on that matter and
25 basically proceed as Your Honor wishes.

1 THE COURT: Well, we're going to go
2 ahead and sentence him today and he could certainly
3 file his motion and the -- if that's what he wants to
4 do and we'll deal with it at that time. But we're
5 not going to hear it today.

6 MR. TAYLOR: Understood, Judge.

7 THE COURT: Okay. Thank you.

8 MR. TAYLOR: Should we begin by
9 discussing a merger issue?

10 THE COURT: Actually, I'll just hear
11 from the State and then you can make your argument.
12 Thank you.

13 MS. ATWOOD: Thank you, Judge.

14 So I had a chance to go through defense
15 counsel's merger motion -- or sentencing memorandum,
16 which does focus on 161.067 and it sounds like the
17 gist of their argument is that the State can't
18 provide any information regarding a sufficient cause
19 or break in the defendant's conduct that would give
20 the Court the authority to sentence him separately
21 for these crimes.

22 However, obviously, we disagree with
23 that assertion. The defense, in their motion, rely
24 on Campbell (phonetic), Huffman (phonetic), Reed
25 (phonetic), Howe (phonetic) and primarily, State v.

1 Cale (phonetic). And then I believe we got another
2 case e-mailed to us yesterday.

3 I didn't have the opportunity to read
4 that. I was in Court yesterday. But when I breezed
5 through it this morning, it seems like it's pretty
6 much in line with what Howe and Cale stand for.

7 However, in addition to these cases,
8 there are a few that I would like to draw your
9 attention to that also have come out this month, so
10 they're fairly new. That would be State v. Dolphu
11 (phonetic) and State v. West-Howell (phonetic).

12 And I -- when I'm done with my
13 arguments, I have a list of citations and I printed
14 out those two for you, so I don't know how available
15 they would be on Westlaw or anything like that.

16 So to go through those two cases, State
17 v. Dolphu first of all, that was a child pornography
18 case where the defendant downloaded several images to
19 his computer and stored them all in one folder that
20 was publicly available on a peer-to-peer network.

21 His charges were 15 Counts of
22 Encouraging I and an Encouraging II. He argued that
23 all the counts should merge because the individual
24 images were found via the same search warrant at the
25 same time and they were possessed by him at the same

1 time.

2 However, the Court denied the merger
3 motion on two grounds, really, the first being that
4 the State had provided evidence during trial that
5 would indicate that they were obtained at different
6 times, the videos -- or the images.

7 And under the circumstances of that
8 case, each download or each image that was at issue
9 could have been proven without getting into the facts
10 of the downloads or possession of the other images.
11 So each count could have been viewed in a vacuum, if
12 necessary.

13 So those were the two important
14 considerations to the judge in that case -- or to
15 the -- the Court of Appeals in that case. Moving on
16 to State v. West-Howell, this was a situation where
17 the defendant basically engaged in a continuous,
18 lengthy, very brutal attack on his wife that
19 consisted of several criminal acts, one after another
20 after another.

21 But in -- as a whole, it was a
22 continuous episode. So the acts in that case that he
23 committed against the victim were Forcible Sodomy,
24 followed by Assault, followed by strangulation,
25 followed by Attempted Rape, followed by another

1 Forcible Sodomy.

2 And he was convicted of the two sort of
3 book-end counts of Forcible Sodomy and argued that
4 this was one continuous episode. His intent to
5 attack this same victim never changed throughout, so
6 the counts should merge. However, the Court again
7 rejected the merger argument.

8 The Court specifically noted that
9 whether it's a continuous episode is really not the
10 operative question. The operative question is
11 whether the intent or the choice that was made when a
12 person commits each violation or each act changes.

13 And the specific language that the Court
14 used was, "Whether the acts were of a qualitatively
15 different nature," if a person has to make an
16 independent choice before committing the next act
17 after the first act begins.

18 Similarly, in State v. King, that's a
19 2014 case, the defendant was convicted of two
20 different counts of Assault -- and I think it was
21 Assault IV and Assault III -- based on one continuous
22 episode of assaulting the same victim.

23 He initially began by assaulting the
24 victim on his own and then his friend joined in and
25 they assaulted the victim together.

1 In that case, the Court also declined to
2 merge those two counts based on two kind of
3 observations, the first being that the defendant
4 could have stopped when or before his friend joined
5 in, but instead, made a conscious choice to continue
6 engaging in the assault, knowing that the nature of
7 the assault had changed.

8 And -- and the language they used in
9 that case was that something of significance occurred
10 in between or during those two separate acts that
11 changes them qualitatively. This, again, leads us
12 into State v. Howe, which is cited by the defense.

13 This was the situation where the
14 defendant orchestrated this kind of group-sex
15 encounter involving a minor. And in that case, the
16 State argued that the counts shouldn't merge because
17 each individual sex act with a different partner
18 constituted a qualitatively different scenario.

19 However, that was distinguishable from
20 these other cases because the Court concluded that
21 the defendant's actions are what the question is, not
22 another person in the room's actions. And in that
23 case, the defendant's conduct, his intent, his
24 control over orchestrating the situation was the same
25 throughout.

1 So Howe is different, factually and
2 legally, from the other cases that I've just
3 discussed because the defendant's conduct didn't
4 change. His choices never differed throughout the
5 entirety of that episode.

6 So when you're looking at these four
7 cases and the other cases that were cited by defense
8 counsel, in briefing, what I kind of compiled were a
9 list of scenarios that the Court has found constitute
10 a sufficient break or change in a person's conduct
11 for purposes of this anti-merger statute.

12 And the scenarios that have been found
13 to constitute that necessary break include where one
14 act begins before another act ends, where each act
15 requires an independent choice, where a significant
16 event occurs differentiating the -- the two criminal
17 acts, where one act could be proven without evidence
18 of the other act, where one act was of a
19 qualitatively different nature than the other act and
20 where a person exercised independent control over
21 each act.

22 In this case, it's the State's position
23 that several, if not all, of these factors or
24 different means of constituting a sufficient break
25 are present. The -- really, the fact that the State

1 charged its counts based on the defendant's actions
2 on individual websites really illustrates this point.

3 By posting to individual websites that
4 are independent of one another, each act that he
5 committed necessarily had to end before the other act
6 began. The defendant had to navigate independently
7 to different websites, typing in different URLs.

8 When we got to these websites, he had to
9 create accounts on these websites where he provided
10 different user profile information from website to
11 website. He had to specifically choose which videos
12 he wanted to upload to which sites. And that differs
13 from website to website, as we saw during trial.

14 These are all independent choices that
15 occurred between each act that he committed. And
16 each one of these choices would constitute a
17 significant event that changed the nature of his act.
18 This also necessarily means that he had independent
19 control over the individual violations themselves.

20 He and only he chose which sites to go
21 to. He was the one who chose whether to create a
22 profile or how much information to provide. He was
23 the one who chose which videos to post and when.

24 And his independent control, again, is
25 reflected by the fact that when you look at the

1 evidence presented at trial, the different sites that
2 he was convicted of by the jury all had different
3 information, different amounts of content, that was
4 uploaded at different times.

5 His act of choosing where, when and what
6 to post, those are qualitatively different entities
7 that vary from count to count. And, finally, the
8 State could have easily presented a case for each
9 count separately, essentially in a vacuum without
10 getting into the facts of the other counts.

11 So by charging the case and -- and --
12 and posing the case to the jury the way that we did,
13 I think that it avoids this issue all together.
14 There's no question about whether or not he committed
15 a separate, qualitatively-different act every time he
16 navigated to a different website and posted different
17 content.

18 This then brings us to the -- the case
19 that defense counsel relies on most heavily, which is
20 State v. Cale. And I think that it's notable that
21 defense counsel omitted probably the most important
22 language in -- in -- that's relevant to our case,
23 that the Court noted in that opinion.

24 In an internet context, the Court
25 basically stated that proof of independent downloads

1 or navigation can show sufficient pause. And I have
2 the exact quote here. When the Court concluded that
3 merger was appropriate in State v. Cale, they
4 concluded so because, quote, "There is no evidence
5 suggesting that the defendant individually clicked on
6 each image or individually initiated each download."

7 This obviously implicates -- or implies
8 that evidence that someone clicks on a different
9 image or navigates to a different download or
10 initiates a different download would constitute a
11 sufficient pause or break in conduct.

12 That's exactly why the State proceeded
13 the way that it did at trial and that's exactly the
14 reason why the defendant should be punished
15 separately for these separate offenses. He had to
16 click to a different website. He had to initiate a
17 different download to commit you to these violations.

18 So that -- for those reasons, I believe
19 that our case is absolutely distinguishable from
20 State v. Cale and from State v. Howe that the defense
21 relies on in their briefing.

22 And I would just note that in actually
23 discussing our case, defense counsel is remarkably
24 minimal in briefing and really only makes two points,
25 the first being that, according to the defense, there

1 is no evidence of the circumstances surrounding the
2 uploads and second, that if the defendant uploaded
3 these images in one sitting, that merger necessarily
4 applies.

5 I'd like to start really, with, the
6 second point that as you've already heard from the
7 case law, that's a complete mischaracterization of
8 what the rules regarding merger are under the
9 statute. It does not matter whether it's a
10 one-sitting or one-continuous-episode situation.

11 And that's exactly what the Court said
12 in West-Howell and in King. Those were the, quote,
13 unquote, "One-continuous-episode cases," where the
14 Court still declined to merge. So that's really not
15 the consideration. The consideration are all the
16 things we talked about before.

17 Second, on -- back to the point of
18 whether or not there were evidence of the
19 circumstances of the uploads in this case, we
20 wholeheartedly disagree with the defense's
21 characterization of the evidence that came out in
22 trial for a few reasons.

23 First being that, to my recollection,
24 the defendant took the stand and admitted that he had
25 uploaded the videos to, I believe, three separate

1 websites, Pornhub, Porn.com and xHamster. That is an
2 admission to committing separate acts via separate
3 navigation on independent websites on the internet.

4 He admitted it to the jury. The second
5 point being that defense counsel essentially made all
6 of these same arguments to the jury during closing
7 and basically crossed the State's detective on this
8 exact issue thoroughly during the course of
9 the trial.

10 It was one of their biggest points of
11 contention, that the State could not prove that he
12 committed independent crimes or independent voluntary
13 acts. This was specifically argued to the jury and
14 they disagreed beyond a reasonable doubt.

15 So that is more than enough information
16 that the Court needs to reject this argument. Now,
17 finally, we disagree about the nature of the evidence
18 that was presented because there was ample evidence
19 and information presented to the jury and to the
20 Court regarding the time and manner and circumstances
21 of the postings.

22 So what I had done was basically compile
23 the list that I went through with the jury in closing
24 that was based on the exhibits provided to the jury
25 during trial. And I limited it to the five counts,

1 obviously, that he was convicted of, which were in
2 reference to Pornhub, RedTube, Porn.com, TNA and
3 xHamster.

4 And this is one of the documents I will
5 supply Your Honor. I've also brought all the
6 evidence back. I don't believe there's really any
7 need for you to examine it again, just based on the
8 legal basis of our argument.

9 However, if you do want to confirm this
10 information for yourself, I have all the exhibits
11 that were supplied at trial and a -- a list basically
12 detailing what specific information we know about
13 the counts he was convicted of. And I'll go through
14 that now.

15 Pornhub was Count 1. In that count,
16 the -- the information that the jury heard was that
17 he had a user name BarberB reflecting that he was a
18 31-year-old male who lives in Portland, Oregon.

19 On that site, the information from
20 screenshots show that he joined two years ago and
21 that he uploaded two videos in April of 2016. These
22 were the videos that were 16 and 18 minutes long.
23 His last login was in June 2016 and the videos were
24 still active.

25 RedTube, this was the site that was an

1 affiliate of Pornhub. And it's important that these
2 two are the only two that he was convicted of that
3 were affiliates because the information on RedTube is
4 completely different than the information on Pornhub.

5 And from the State's closing argument,
6 that was our position, was that the fact that this is
7 different content posted at different times by
8 someone who joined at different times, shows that he
9 committed these acts independently.

10 So getting to RedTube, again, user name
11 BarberB, except this time, he was reflected as a
12 31-year-old male who lives in Newberg. He joined
13 that website not two years prior, but in April. And
14 he uploaded four videos, including two that were
15 totally different from the Pornhub videos, on April
16 6th, 2016.

17 His last login was in April, most likely
18 when he posted those videos. So he was still logging
19 in and using Pornhub, even after he was using
20 RedTube. And the videos were, again, still active by
21 September.

22 Porn.com, his user name was BarberB. He
23 joined in March, so that was, again, a different time
24 of joining than Pornhub and RedTube. He was -- he
25 uploaded four videos that were both seen by the

1 victim and by Deputy Duenas. However, he removed
2 those videos after police contact.

3 And they were then unavailable to
4 Detective Rookhuyzen by the time he was completing
5 his investigation, again, suggesting that he had
6 independent control over these videos.

7 And this, Porn -- Porn.com, notably was
8 an independent website, not related to any of the
9 other four counts that he was convicted of. Fourth,
10 TNAFlix, user name BarberB. On that website, he was
11 noted to be a verified member.

12 He uploaded two videos in March 2016.
13 So, again, different from not only Porn.com, RedTube,
14 but these two videos were different than the two
15 videos uploaded to Pornhub. And these videos were
16 still active by September 2016.

17 Finally, Count 5, xHamster. His user
18 name was Benjamin Barber and he was registered at
19 starworks@gmail.com. And we know that because of the
20 e-mail he sent to the victim, reflecting that he had
21 not only admitted to uploading videos to this website
22 specifically, but that he was the one who exercised
23 control to remove them.

24 And he uploaded, uniquely, three videos
25 to this website as opposed to the two on Pornhub and

1 TNA that were different and the four on RedTube and
2 Pornhub that were different.

3 So this information obviously indicated
4 to the jury and should indicate to you now that not
5 only did he have independent control over his actions
6 on these websites, he joined them at different times.
7 He uploaded different content at different times. He
8 removed some but not all.

9 All of this points to the fact that
10 these counts are qualitatively different, that there
11 was a sufficient pause between March and April of
12 2016 and that he, in fact, did make a conscious,
13 controlled choice between posting from one website to
14 another to another.

15 He could have stopped after the first
16 one, but he did not. And he should be held
17 accountable for every action that he took thereafter.
18 So from the State's perspective, there is ample
19 evidence to -- to prove -- and -- and there was
20 enough evidence to prove to the jury beyond a
21 reasonable doubt that these were all independent
22 choices that he made voluntarily and consciously.

23 However, even if the Court were to
24 determine that these violations occurred or could
25 have theoretically occurred as one course of conduct,

1 I would suggest that the Court look at ORS 137.123.

2 That statute states that the Court has
3 discretion to impose consecutive terms for separate
4 convictions arising out of a continuous course of
5 conduct that the Court finds a couple of things:

6 First, that these independent violations
7 were not merely incidental to one act and that they
8 were, instead, an indication of the defendant's
9 willingness to commit more than one criminal offense;
10 and second, that the violations themselves, the
11 greater and greater violations, caused or created a
12 risk or causing greater loss, injury or harm to the
13 victim.

14 Both of these elements are present in
15 this case, basically, due to the nature of the crime
16 itself. Again, because he posted these to different
17 websites, I think it's obvious that this isn't a
18 merely incidental violation that arose from one act.

19 There was no information presented at
20 trial that would indicate that, including the
21 defendant's own admission to posting -- sorry --
22 to -- to numerous websites. Second, obviously,
23 the -- the nature of the violations themselves causes
24 and creates a risk of causing greater loss, injury or
25 harm to the victim.

1 The reason that this statute exists is
2 to protect people from the extensive amount of harm
3 that can result from these types of images being
4 posted to the internet.

5 Every single time the defendant decided
6 to post to a third, fourth, fifth website, the harm
7 to the victim became exponentially greater and he
8 should be held accountable for that. There's a few
9 cases on point to this statute as well, the first one
10 being State v. Cone.

11 In that case, the defendant was
12 convicted of Assault and Burglary arising out of one
13 incident against the same victim. However, the Court
14 noted that the -- the harm of an assault is different
15 and greater than merely the harm of a burglary, so he
16 should be held independently accountable for those.

17 In State v. Grove, this was also a
18 Burglary and Attempted Rape. The record supported
19 the sentencing Court's finding that the defendant was
20 willing to commit both crimes. And that basically
21 gets to Subpart A of this statute, that this wasn't
22 incidental.

23 He didn't incidentally rape someone when
24 he decided to break into their home. He
25 independently made the choice to commit both of those

1 acts and was held independently accountable for them.

2 Similarly, State v. Anderson, the
3 defendant's convictions for Robbery and Assault of
4 the same victim were punished separately and -- and
5 independently of each other, consecutively, because
6 the harm of striking the victim through the -- the
7 course of the robbery was not only qualitatively
8 different, but more serious and more harmful,
9 personally.

10 And, finally, in Austin v. McGee, that
11 case involved a conviction for Third Degree Rape and
12 a conviction for First Degree Rape, arising out of a
13 single sexual assault to one victim.

14 Those counts were served consecutively
15 because of the greater harm of committing the
16 secondary violation, regardless of whether it arose
17 out of the same course of conduct.

18 So, again, I disagree with the defense
19 on the legal basis for their merger motion. I
20 disagree with the characterization of the facts and
21 even if the Court were to consider the defense's
22 motion, I think we have a completely independent
23 basis for punishing these counts separately.

24 Unless you have any other questions for
25 me, I can forward to you the cases that I've printed

1 out, the citations and the sort of go-to list of
2 evidence. And would -- do you want the actual
3 exhibits themselves?

4 THE COURT: No.

5 MS. ATWOOD: Okay.

6 THE COURT: You may give them to my
7 staff.

8 MS. ATWOOD: And I guess with that, I
9 will end and then when we actually get to
10 sentencing --

11 THE COURT: Okay.

12 MS. ATWOOD: -- I have some more
13 comments.

14 THE COURT: Mr. Taylor.

15 MR. TAYLOR: Thank you, Judge.

16 I'm going to keep my remarks relatively
17 brief. I think the State is mischaracterizing the
18 merger issue and I think the case that makes that
19 most clear is the case I've forwarded to the Court
20 that came out in the Court of Appeals yesterday
21 morning, so I apologize. I didn't have a chance to
22 summarize and brief it.

23 But the basic circumstances of that case
24 are a guy gets convicted of three counts of Sex Abuse
25 I. The factual scenario is that he --

1 THE COURT: I read the case.

2 MR. TAYLOR: Oh, thank you, Judge. All
3 right. So when the State argued about merger, they
4 seemed to place a great deal of weight on this idea
5 of independent choices and independent personal
6 control of the actions, saying that, no matter what,
7 if Ben Barber was sitting there in front of a
8 computer clicking, each time he clicked, it was an
9 independent choice.

10 And that clearly isn't what the cases
11 tell us because, as Nelson showed, the guy was
12 convicted of three different Sex Abuse counts for
13 touching the same person in different areas. Those
14 would obviously be independent choices each time he
15 touches a different part of this person.

16 And he has total control over and as the
17 State put, could stop any time he wanted. So that
18 can't be the legal issue here. The real question it
19 seems, Judge, is was there an intervening act?

20 And the State got at a lot of that in
21 their case as they talked about because they
22 discussed, you know, the one case where the guy
23 commits this whole string of Sodomy, Assault,
24 strangulation leading to sodomy, gets convicted of
25 the two Sodomies.

1 And then the Court looks and says, "Ah,
2 obviously, there was intervening circumstances where
3 things changed." This ended being a sexual assault,
4 became a more physical -- or straightforward physical
5 assault and then became a sexual assault. So you've
6 got different crimes occurring. And it's clearly
7 different here where --

8 THE COURT: Go ahead.

9 MR. TAYLOR: -- the State has to prove
10 that Ben Barber did something different. And I guess
11 what I'm getting at -- and I had a little bit of
12 discussion with Ms. Atwood.

13 I've reviewed what I recall of the
14 evidence and using the State's own sort of cheat
15 sheet, it's -- I -- I agree that they have evidence
16 and did present evidence at trial that there were
17 some videos uploaded in April, some videos uploaded
18 in March.

19 So you've got Pornhub and RedTube, which
20 both appear to be April. There's a specific date on
21 RedTube; that's April 6th. There's no specific date
22 on Pornhub. And as the State noted themselves, those
23 sites are affiliated. With Porn.com and TNAflix, all
24 we know is that they both came up in March 2016.

25 And then with regard to Count 5,

1 xHamster, we don't appear to have a date. The State
2 didn't mention any sort of dates and I don't recall a
3 date being presented at trial.

4 I will admit that I have been -- you
5 know, this case hasn't been as easy for me to pore
6 over the evidence since the State has kept it sealed
7 the entire time and I was only able to view it.

8 But I believe that at trial, the only
9 evidence presented is that there were -- Counts 1
10 and 2 occurred in April, 3 and 4 in March and then
11 unknown in -- a -- a Count 5 is unknown. And so the
12 burden, again, is on the State.

13 And the case law is very clear they must
14 produce non-speculative evidence that there was
15 separate -- that -- that there were distinct
16 transactions. And I think the State has not been
17 able to prove whether the two counts in April were
18 the same day, sitting at the computer at the same
19 time and same with the counts in March.

20 So I think, at most, Counts 1 and 2
21 should merge and Counts 3 and 4 should merge and
22 Count 5 should merge with one of those two counts.
23 So I think we're looking at a total of two
24 convictions.

25 Now, turning my remarks to the

1 concurrence issue, the State's kind of bringing this
2 up right now. I'm reading over the statute,
3 specifically, 137.123(5) where it's talking about the
4 Court's discretion to impose consecutive counts.

5 I don't believe that, you know, those
6 two qualifications are met. Subsection A, I don't
7 believe, is met because it requires just discussion
8 about willingness to commit a more serious crime and
9 that the other crime was sort of incidental to that
10 commission.

11 That's clearly not met in this case
12 because we have five counts that are all exactly the
13 same crime. There is no more or less serious crime
14 here. And the second one, Subsection B, is talking
15 about different victims. And there's clearly not
16 different victims in this case. It is one victim,
17 Ms. Vance.

18 So, Judge, I don't believe either of
19 those exceptions are met. I think no matter how many
20 separate convictions the Court enters, I do think any
21 sentences would have to be concurrent. But, again, I
22 do believe that it should merge down into two counts.

23 THE COURT: Okay. So as far as the
24 merger issue, I do find -- I reviewed the evidence
25 myself. I had kept the notes and I do find that each

1 act was a separate act and transaction, independently
2 exercised to make a conscious choice to commit that
3 crime at that time. So I do find that all five
4 counts are separate acts and transactions and he'll
5 be sentenced accordingly.

6 So what would you like me to know,
7 Ms. Atwood, regarding sentencing?

8 MS. ATWOOD: Thank you, Judge. So I'm
9 not going to really review, like, what came out at
10 trial. I'm sure this case is unique enough to
11 everybody that we recall the gist of the -- the
12 factual situation.

13 But I kind of just want to touch on the
14 overall harm that this has caused to the victim and
15 what we had heard and saw from the defendant during
16 the course of the trial.

17 This was a person who not only was
18 emotionally harmful and manipulative to the victim
19 during the course of their relationship, but bad
20 behavior has not only continued, it has escalated
21 since she has tried to leave him.

22 She has -- she has spent the past three
23 years of her life trying to extricate herself from
24 this individual and he has responded by doing
25 everything he can to prevent that, including

1 stalking-type behavior, relentless contacts despite
2 cease-and-desist notices, harassing her and her new
3 boyfriend and, finally, the -- the incidents that led
4 to the charges filed in this case.

5 I -- I just want to discuss the facts
6 that the defendant took the stand, he took an oath
7 and he, on direct, testified that he only did what he
8 did because he was very depressed and that he also
9 thought that the victim had given him permission.

10 But as we saw on cross, his testimony on
11 cross-examination revealed that this, essentially,
12 was a complete fabrication. He only responded to the
13 State's inquiries on cross by stating that the -- the
14 victim has no rights, that he does not respect her
15 rights to privacy over these images, that he doesn't
16 even -- even respect the law.

17 The fact that what he did was illegal,
18 he didn't care. He -- he believed himself to be
19 above it because he didn't like it. And clearly,
20 from what we heard on cross, he does not have even
21 the slightest amount of -- of remorse for what he has
22 done to her.

23 He, in fact, testified that he would
24 like to see her arrested for what she's done to him.
25 This sort of backwards, I guess, respect for the

1 situation at hand gives us no indication that he's
2 going to change his mindset, let alone his behaviors.

3 And I just want to emphasize that I know
4 that defense counsel is going to rely heavily,
5 probably, on the fact that these are the defendant's
6 first criminal convictions. He does have the arrest
7 for Harassment against this victim.

8 I believe he has also got a case for
9 Trespassing at, I think, a women's rights -- or
10 feminist conference where he was harassing women
11 there.

12 But despite the fact that his criminal
13 history is not extensive, I really just want to
14 emphasize for the Court that the victim will
15 literally never be able to walk away from what he did
16 to her.

17 She tried to have the videos removed.
18 Even he tried to remove some of them. And you know
19 how the internet works. It's game over for her,
20 essentially.

21 She's told me that it's, basically, just
22 a ticking clock until she realizes that someone who
23 she is a teacher to or a parent who she works with is
24 going to see these things about her online.

25 She thinks that it will forever leave

1 her job and her livelihood and her personal
2 self-worth in jeopardy because of his actions that he
3 does not have any regard for.

4 Having said that, I think that this is a
5 serious case, these are serious charges and they
6 should have serious penalties. The State's offer
7 initially to the defendant as far as custody time was
8 concerned was 90 to 180 days jail per Court.

9 I think that not only the facts of the
10 case, but the defendant's attitudes to -- toward the
11 Court, toward the State, toward the victim during
12 trial, have kind of heightened the stakes for him.

13 I think that he should be subjected to
14 at least 180 days to a year jail per Court. I think
15 that on another count, obviously, he should be placed
16 on five years of formal probation and as part of that
17 formal probation, he should be required to do a
18 number of things.

19 I think he should be subjected to sex
20 offender evaluation and treatment, including the
21 conditions involving restrictions on internet and
22 computer use.

23 He should engage in domestic violence
24 evaluation and treatment as per his PO and, finally,
25 a mental health evaluation and treatment per PO

1 because, from the victim's perspective, there's
2 something underlying this behavior that -- that leads
3 him to lash out against her, specifically, that needs
4 to be addressed.

5 And from the State's point of view, when
6 we see this sort of thing, I think mental health
7 could be at issue. I'm torn, I guess, regarding the
8 computer conditions and whether or not to ask the
9 Court to require as a part of probation that the
10 defendant actively try to remove and delete any and
11 all copies of these videos or images that he has of
12 the victim.

13 The reason I'm torn is -- I mean,
14 we've -- we've done this on other cases before as
15 part of probation. And I do want for the victim's
16 sake, for these to be removed as fastly and -- and as
17 quickly and as effectively as possible.

18 However, I don't necessarily trust, A,
19 that the defendant will do this to his own best
20 ability and, B, that he won't try to, again, save
21 some of these images for other potentially criminal
22 uses or try to manipulate the situation in some
23 other way.

24 So I will leave that as kind of an idea
25 open to the Court, either in addition to or maybe

1 before the computer conditions set in. We would
2 obviously ask for no contact with the victim or with
3 her boyfriend, Micah Goldstein, who also has been
4 concerned for the defendant's behavior toward him
5 throughout this whole situation. I don't believe --

6 THE COURT: Is there any restitution
7 (indiscernible)?

8 MS. ATWOOD: I don't believe there's any
9 restitution at issue, Your Honor. And with regards
10 to the jail time, we would leave programming per
11 Court.

12 Unless you have any other questions for
13 me, I think that that's all I have.

14 THE COURT: Okay. Thank you.

15 Mr. Taylor.

16 MR. TAYLOR: Judge, I'm not going to
17 rehash a lot of the facts about what happened at
18 trial because, as Ms. Atwood said, we all remember.
19 This has clearly been a very complicated relationship
20 in which, yes, the facts do indicate that Mr. Barber
21 was not the party in the right most of the time.

22 I think that it is now very clearly over
23 and I think that's the most important thing towards
24 making sure that nothing like this ever happens
25 again.

1 When I look at this case as an objective
2 observer, Judge, I think that the appropriate thing
3 in this case is to ensure that Mr. Barber never has
4 any contact with Ms. Vance again and to get at what
5 might be the root causes of what brought us here
6 today.

7 And when I look to those, the things
8 that come to me are the DV package and the mental
9 health package. Regarding the mental health, Judge,
10 when we were investigating this case, I came across a
11 lot of records that were not relevant at trial, so
12 I've never brought them before the Court.

13 What they indicated is that Mr. Barber
14 does have a form of mild autism and I think that
15 plays into some of the behavior here because in my
16 researching that issue, people with autism have
17 difficulty understanding the consequences of the
18 things they say or the things they do on other
19 people.

20 And I spoke to a doctor about this for a
21 while because, quite frankly, I found it interesting.
22 And I think there's a good part of that in play in
23 this case.

24 I think there may be some other mental
25 health issues. There was obviously testimony and

1 discussion at trial about depression and suicidality
2 that played a big part in his actions earlier this
3 year.

4 So I think that the mental health
5 package is absolutely appropriate. I also am not --
6 not going to oppose at all the domestic violence
7 package.

8 I think that we all know that package
9 gets to issues of relationship dynamics, control and
10 things like that, that were clearly at play in this
11 trial.

12 What I would ask the Court not to impose
13 is the sex offender package. I don't think that
14 there was really any testimony in this trial or any
15 evidence that this -- I mean, yes, there are
16 obviously pictures of sex and videos of sex.

17 But what there wasn't was any indicia of
18 sort of deviate sexual intercourse, illegal sexual
19 intercourse or actions or things of that nature. In
20 my understanding -- and Your Honor knows I -- I don't
21 do a ton of sex cases. I am a newer attorney.

22 But my understanding of the sex offender
23 package is that it primarily focuses on that type of
24 action. And I don't think that those classes or
25 those courses, from what I know about them, are going

1 to do anything for Mr. Barber or correct any
2 inappropriate behavior that he's currently
3 engaged in.

4 So I think that is a -- is a misstep.
5 And I also know that package is incredibly expensive,
6 incredibly time consuming, difficult. And requiring
7 those classes and things like that, I don't think, is
8 going to add anything and I think it's going to make
9 it much more difficult for Mr. Barber to be
10 successful on probation.

11 Now, I think a great deal of
12 Mr. Barber's anger and resentment towards Ms. Vance
13 came from his perception of what she had done. And
14 we heard that over and over again. Between the
15 divorce, garnishments, his housing, he blamed a great
16 deal of it on her. Those feelings, I think, will be
17 addressed by the DV package.

18 What I think is important to having
19 Mr. Barber live a successful life and not come before
20 this Court again or any other Court is for him to be
21 on his own, having learned lessons, but to be able to
22 be employed and successful.

23 And I think that, you know, getting back
24 to what I said a moment ago, is that a great deal of
25 his anger was that he felt like he couldn't get a

1 job, he couldn't get a house, things like that.

2 And so I think the best course of action
3 is to send him into a situation where, yes, he has
4 requirements and he needs to take probation seriously
5 and not mess around. And I think formal probation
6 with someone supervising him would be a good idea for
7 the Court.

8 But loading him up with so many packages
9 of -- of dubious influence, I -- I -- I would not ask
10 for. With regard to custody time, Judge, Ms. Atwood
11 is correct. This is his first -- these are his first
12 real convictions.

13 Both of them, he and Ms. Vance, have a
14 Harassment arrest against each other when they lived
15 in Multnomah County years ago. Mr. Barber does have
16 a Criminal Trespass II from when he was apparently
17 causing a ruckus and getting loud at some conference
18 that he politically disagreed with.

19 But this will be his first conviction.
20 He already did 62 days of pretrial, no-program time.
21 I know that was an incredibly difficult time for him.
22 I know, above anything, I think that really sort of
23 turned his head as far as what's going on.

24 And I guess I'll wrap up by talking
25 about the State's argument that he lied on the stand.

1 He's -- the State trots this out with great frequency
2 and just wants to read a lie into everything. And
3 this is the situation as I understand it, Judge.

4 I absolutely believe that Ben Barber did
5 intend to kill himself and that posting these videos,
6 in part, was related to that. I'm not going to stand
7 here and say the jury's totally wrong. But I think
8 that there was a great deal to what Mr. Barber had to
9 say on direct.

10 This was the same thing he told me from
11 Day 1 of this case in tears when I said, "Why did you
12 post these videos?" This was not a story he cooked
13 up the week or two before trial. The fact that, yes,
14 on cross, he spent most of his time arguing with
15 Ms. Atwood about copyright.

16 Mr. Barber, like I talked about in my
17 closing argument, is a guy who gets an idea under his
18 skin and really sticks with it. And he was really
19 interested in doing legal research on his case. He
20 is a smart guy and he spent a lot of time at the
21 library -- law library.

22 And, yes, he got hung up on this
23 copyright issue and I think he probably tends to
24 pursue some of that at the appellate level or
25 something like that. But that doesn't mean that he

1 was lying.

2 He has opinions that he has developed
3 during the pendency of this case about the law and
4 how it works and how it interacts with the statute.
5 But that doesn't mean he was lying.

6 He may have been disagreeable and we all
7 watched that cross-examination and saw that. But
8 this idea that he's just this remorseless liar, I
9 don't think, is supported by what actually happened.

10 We obviously don't object to any of the
11 no contact or anything like that. That's a great
12 idea.

13 THE COURT: Is your client working
14 today?

15 MR. TAYLOR: My -- the last we talked
16 about that a couple of weeks ago, he was doing day
17 labor at Labor Ready and places like that. I would
18 remind the Court that he is, by trade, a -- a
19 computer engineer.

20 So if you're going to impose computer
21 conditions, we would ask that at least perhaps the
22 probation officer have discretion about whether he
23 could use them for work purposes.

24 THE COURT: Okay. Mr. Barber.

25 DEFENDANT BARBER: Well --

1 THE COURT: You need to stand up, sir.

2 DEFENDANT BARBER: Sorry. So, like, I
3 did, actually, you know, like I said, upload those
4 and I did testify that was the case.

5 And the reason that I was disagreeing
6 with Ms. Atwood was that Ms. Vance said that she did
7 give the videos to other people and those other
8 people did upload them for the purposes of
9 intimidating me.

10 And so I'm -- I'm not sure why she would
11 claim that they were to be held private and I think
12 that was a matter of discontent between me and her
13 about what rights are granted, including copyrights
14 to another person.

15 And in the circumstance about putting
16 those videos, I was uploading everything that I had.
17 I have, like, some screenshot of essentially all the
18 code I had uploaded at the same time as I was
19 uploading all this --

20 THE COURT: What would you like me to
21 know about your sentencing, sir?

22 DEFENDANT BARBER: Oh, okay. Sorry.
23 What do you want me to tell you about the sentencing?
24 So I am trying to be employed as a computer engineer.
25 And so I'm hoping that I'm able to keep a sort of job

1 where I can do that.

2 I think Ms. Atwood said something to the
3 effect that she didn't want me to use the computer
4 for five years, which was their main reason why I
5 didn't take any plea agreement, was because I thought
6 that would, essentially, do me to not ever having a
7 job and not being able to take care of myself because
8 I have, like, physical ailments that sort of make it
9 hard to do physical labor, like Crohn's disease.

10 And then in terms of a -- a jail
11 sentence, I have been in jail for a significant
12 amount of time, obviously. I'm not trying to be in
13 jail for a long period of time. And I'll
14 basically -- I think that even having convictions are
15 going to make it more difficult for me, but I --

16 THE COURT: Do you understand, sir --

17 DEFENDANT BARBER: Yeah.

18 THE COURT: -- the harm that you did to
19 the victim?

20 DEFENDANT BARBER: I -- I understand the
21 harm. And I wasn't intending on harming the victim.
22 There are ways that I could have tried to have her
23 arrested for things that she had done in the past.

24 THE COURT: Sir.

25 DEFENDANT BARBER: Yes, ma'am.

1 THE COURT: Do you understand what your
2 actions did to her and her livelihood and her
3 reputation and the rest of her life?

4 DEFENDANT BARBER: Yeah, I -- I
5 understand. We -- having had a --

6 THE COURT: And how do you feel about
7 that, sir?

8 DEFENDANT BARBER: I feel that she has
9 done the same exact back to me --

10 THE COURT: So you're not feeling the
11 least bit remorseful about it, do you? You feel you
12 had a right to do it, didn't you?

13 DEFENDANT BARBER: Well, I mean, I think
14 that when a person has unclean hands, that it -- I
15 mean, we've done terrible things to each other.

16 THE COURT: So two -- two wrongs make a
17 right, sir? Is that what you're saying?

18 DEFENDANT BARBER: No. Actually, I said
19 to Duenas that two wrongs don't make a right.

20 THE COURT: But that's what you're
21 saying. You're saying because she was guilty, that
22 you can do whatever you want to do.

23 DEFENDANT BARBER: Well, I don't think
24 that I can do whatever I want to do. But like I
25 said, I -- I was feeling very terrible about myself

1 and I don't think this was the right way.

2 Had she come to me and said, "This is
3 causing me a problem at my job," I would have just
4 taken them down. I would have not, like, had a big
5 fight with her over it. I --

6 THE COURT: And I don't believe you,
7 sir.

8 DEFENDANT BARBER: Okay.

9 THE COURT: All right. Thank you.

10 MS. ATWOOD: Judge, I forgot to add, we
11 have a victim impact statement that the victim's
12 attorney would like to read.

13 THE COURT: Okay.

14 MS. KEBLER: Thank you, Your Honor. And
15 for the record, Melanie Kebler. I represent
16 Ms. Vance. Bar No. 083798. She could not take more
17 time off work to be here today, so she asked me to
18 read this statement on her behalf. So the following
19 is her statement.

20 "This crime has affected my life in many
21 ways. The biggest way it has affected me is
22 emotionally. Since I left our marriage in 2013, I've
23 been in therapy for PTSD-like symptoms due to Ben's
24 harassment during and after the relationship.

25 "Since I found the videos on pornography

1 sites, many of my PTSD symptoms have returned,
2 including fear of people, difficulties with
3 short-term memory, nausea and vomiting, depression
4 and increased social anxiety, such as lack of trust
5 of family and close friends and fear of being harmed
6 by others.

7 "I ended my relationship with my
8 boyfriend, Micah, because my anxiety and panic around
9 men has overwhelmed me so much that I cannot be
10 around him and still function at my job or in life.
11 For example, I go to the grocery store and forget
12 what I need to shop for repeatedly because of the
13 anxiety and trauma.

14 "Financially, I've taken several days
15 off of work to attend trial, as well as attend
16 meetings with the DA to prepare for the trial. I've
17 also needed to take two sick days due to the nausea
18 and vomiting from anxiety I've experienced since
19 trial, though I have felt physically ill every day
20 since the trial.

21 "Ben and I have a long history of him
22 threatening me with legal action if I leave, finding
23 my address and posting it online against my wishes,
24 repeatedly contacting me after I ask him to stop,
25 contacting Micah to tell him my transgressions and

1 generally trying to shame me if I leave, while trying
2 to manipulate me to be with him.

3 "I could move on with my life and mental
4 health if Ben stops contacting me and harassing me.
5 He has told me he would make my life as miserable as
6 possible if I left him without going through the
7 amount of marriage counseling that he wanted and I
8 believe he won't stop.

9 "I want this harassment and threats to
10 stop so I can move on with my life and mental health.
11 I'm thankful that after several years, Ben finally
12 clearly broke the law so I could pursue victim's
13 rights.

14 "I was not able to get a protection
15 order from him until this case because I had
16 successfully hidden from him for years while he would
17 repeatedly contact me and purchased the website
18 meaganvance.net.

19 "I know Ben won't stop and I want to
20 finally be safe from him. I'm hoping that Ben will
21 receive as much probation as possible so I can
22 legal -- be legally protected from his actions that
23 threaten my safety, but may not quite break the law.

24 "Ben needs mental health counseling of
25 some sort because he cannot move on from me or let me

1 go and he actually thinks he's done nothing wrong.
2 He needs mental health treatment as well as domestic
3 violence or domestic harassment counseling because
4 I'm not the first woman he has harassed, threatened
5 and tried to trap into being with him.

6 "I am hopeful that Ben will receive more
7 jail time so that I'm safe from him, especially since
8 I know that he has purchased a website with my name
9 and has every reason to try to continue to harass and
10 harm me.

11 "And I know he won't stop now,
12 especially since I have, quote, 'Ruined his life,'
13 which are his words and messages to me, by defending
14 myself against revenge porn."

15 And, Your Honor, I just wanted to note
16 in the statement that she says she has ended her
17 relationship with her boyfriend who was here with her
18 in trial. I would still ask that he be part of the
19 no-contact order. And we agree otherwise with the
20 State's recommendation.

21 THE COURT: Thank you.

22 All right. So I will sentence you now,
23 sir. So you need to stand up again.

24 My greatest concern, again, with you,
25 Mr. Barber, is that you really don't understand your

1 actions and you are playing the victim.

2 And I -- I think that's very unfortunate
3 because you're not going to be able to move on and --
4 and be a productive person until and unless you get
5 rid of that victim's stance that you have.

6 So on Count 1, I am going to sentence
7 you to a straight jail sentence of six months in a
8 Washington County Jail. You will get credit for time
9 served and all programs. And I will allow you to
10 turn yourself in tomorrow by 7 o'clock.

11 DEFENDANT BARBER: Okay.

12 THE COURT: And so your attorney will
13 tell you how to do that, that you can turn yourself
14 in to the jail Friday by 7:00 p.m. And then you'll
15 get six month -- six months in custody.

16 And there's jail MAPS, so it's not going
17 to be a complete six months, but that's going to be
18 the sentence on Count 1. There is a \$387 attorney
19 fee on that and a \$100 conviction fee.

20 On Counts 2 through 4, I'm sorry, 2
21 through -- I don't think they're 2 through 5.

22 What -- what are the count numbers
23 again?

24 THE CLERK: 2 through 5.

25 THE COURT: They are 2 through 5?

1 On Counts 2 through 5, I will place you
2 on a five-year formal probation. As a condition of
3 that probation, you are going to be subjected to a
4 sexual offender evaluation. And if they determine
5 that you do, in fact, have some issues, they will do
6 whatever treatment they deem to be appropriate.

7 If they decide that that's not
8 appropriate, then you won't have to complete
9 anything. But you do have to do the evaluation. You
10 also will not -- you will remove all the sexual
11 images of the victim from your computer and you'll do
12 that with the assistance of your probation officer.

13 So you'll bring the computer into the
14 probation officer and work with the probation officer
15 in order to do that.

16 You will remove all sexual images of the
17 victim from the internet, additionally. And you are
18 not to use your computer or electronic devices for
19 any sexual activity and that will be worked with
20 through your probation officer.

21 So I'm not prohibiting your ability to
22 get a job in the computer industry. I realize that
23 that's something that you know how to do and that you
24 will be successful in doing that as long as you have
25 access to a computer.

1 I will -- also will impose the domestic
2 violence package and any treatment that is ordered in
3 that, you will complete and also a mental health
4 evaluation and any treatment for that.

5 You are to have no contact with
6 Meagan Vance, her friends or family through the
7 period of your probation unless you get written
8 permission from your probation officer.

9 And there is a \$100 conviction fee on
10 each of those four counts. And I'll start payments
11 on those in six months at \$25 per month, but it has
12 to be paid off within 60 days of expiration of your
13 probation.

14 Anything I've forgotten, Ms. Atwood?

15 MS. ATWOOD: I don't believe so,
16 Your Honor.

17 THE COURT: Mr. Taylor, anything?

18 MR. TAYLOR: No, Judge. Thank you.

19 THE COURT: And, sir, what time will you
20 be turning yourself in to the jail?

21 DEFENDANT BARBER: You said it was
22 7:00 a.m.?

23 THE COURT: 7:00 p.m.

24 DEFENDANT BARBER: 7:00 p.m.

25 THE COURT: What day?

1 DEFENDANT BARBER: Tomorrow.

2 THE COURT: Okay. And what happens, do
3 you think, if you don't do that?

4 DEFENDANT BARBER: There will be a
5 warrant issued for the arrest.

6 THE COURT: Okay. All right. So that's
7 all for today then. Thank you.

8 MR. TAYLOR: Thank you, Judge.

9 DEFENDANT BARBER: Oh, am I suppose to
10 file this motion?

11 MR. TAYLOR: I'll talk to you about
12 that.

13 DEFENDANT BARBER: Okay.

14 * * *

15 (Conclusion of proceedings,
16 Volume 5, 12-1-16 at 9:18 a.m.)

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REPORTER'S CERTIFICATE

I, Katie Bradford, Court Reporter of the Circuit Court of the State of Oregon, Twentieth Judicial District, certify that I transcribed in stenotype from a digital audio recording the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE BETH L. ROBERTS, on **December 1, 2016**;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, **Volume 5 of 5, Pages 655 through 703**, both inclusive, constitutes a full, true and accurate record of said proceedings taken from a digital audio recording and so reported by me in stenotype as aforesaid.

Witness my hand and CSR Seal at Portland, Oregon, this 12th day of January, 2017.

Katie Bradford, CSR 90-0148
Court Reporter
CSR Expires: 9-30-17
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